

**GREENING THE INTERNATIONAL CRIMINAL COURT: A CRITICAL INQUIRY INTO
ENVIRONMENTAL LIABILITY UNDER THE ROME STATUTE**

*Solomon Mayers**

A. INTRODUCTION

B. CONTEXT

C. ENVIRONMENTAL DAMAGE AS A WAR CRIME

(1) Material Scope

(2) Damage and Proportionality

(3) Article 8(2)(b)(iv): An Impotent Mechanism

D. ENVIRONMENTAL DAMAGE AS AN UNDERLYING ACT

(1) Genocide

(2) Crimes Against Humanity

(3) Environmental Liability Through an Anthropocentric Lens

E. CONCLUSION

* Research Intern and Scots Law LLB Graduate from the University of Glasgow.

A. INTRODUCTION

The International Court of Justice speaks of the natural environment as the “living space, the quality of life and the very health of human beings, including generations unborn.”¹ However, this vital asset faces a profound threat. The very ecosystems that sustain all life are at risk of destabilisation due to decades of deforestation, habitat clearance, carbon emissions, unsustainable resource extraction, destructive methods of warfare, and pollution of land, water and air.² Given the emerging consensus that the “triple planetary crisis” of climate change, biodiversity loss and pollution bears existential implications,³ international organisations have faced heightened calls to confront the causes of environmental decline. Although not typically associated with ecocentric ambitions, attention has nevertheless turned to the role of international criminal law and its institutional body, the International Criminal Court (ICC), to mobilise its enforcement machinery against the authors of environmental degradation. Hence, this article examines the ICC’s substantive criminal law framework to appraise its viability as a forum for addressing serious incidents of environmental harm. Therein, it is argued that the ICC’s green jurisdiction is too narrowly framed to pursue environmental concerns in either a practically meaningful or normatively satisfactory manner.

B. CONTEXT

An examination of environmental liability under international criminal law benefits from surveying its normative and policy context. The Preamble to the Rome Statute of the International Criminal Court (the Rome Statute)⁴, the ICC’s constitutive document, casts its jurisdiction over the “most serious crimes of concern to the international community,” which “threaten the peace, security and well-being of the world.”⁵ As Triffterer and Ambos observe, the drafters of the Rome Statute deliberately inserted the term “world” over more anthropocentric language to signal concern not only for humanitarian rights, but also the natural

¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 226, 241-242.

² For a comprehensive explanation: see Polly Higgins, Damien Short and Nigel South, ‘Protecting the planet: a proposal for a law of ecocide’ (2013) 59 *Crime Law Social Change* 251, 252-255.

³ United Nations Environmental Programme, *Global Resources Outlook – Bend the trend: pathways to a liveable planet as resource use spikes* (2024) ix; International Governmental Panel on Climate Change, *Climate Change 2023: Synthesis Report – Summary for Policymakers* (2023) 24-25.

⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

⁵ *ibid.* Art. 5 and Preamble paras. 3-4.

conditions on which they depend.⁶ This interpretation suggests an interdependence between environmental integrity and the core collective values protected by international criminal law, reinforcing the notion that effective protection of human interests requires the preservation of the vital ecosystems upon which they depend.⁷ However, caution is warranted in assigning too much significance to this subtle preambular clue, as its normative influence is undermined by an unmistakable anthropocentric disposition in the substantive text of the Rome Statute.

The ICC's jurisdiction *ratione materiae* is confined to the four “core crimes”: aggression, war crimes, genocide, and crimes against humanity.⁸ Proposals for a discrete, ecocentric crime against nature were ultimately discarded by drafters of the Rome Statute.⁹ Nevertheless, in response to the calls for the ICC to engage more directly with global environmental decline, the Office of the Prosecutor has, since 2016, placed a policy emphasis on crimes committed by means of (or resulting in) environmental destruction within case selection strategies.¹⁰ However, any expectation that this “green shift” would induce a sharper focus on environmental concerns is dispelled by the lack of such substantial investigations, prosecutions, or convictions by the ICC hitherto.¹¹ Several factors may explain this outcome. For one, empirical research into the Prosecutor's exercise of discretion indicates an aesthetic bias towards highly visible instances of human casualty or suffering, steering attention away from suspected environmental wrongdoing which yields less immediate humanitarian implications.¹² This article advances evidence of this structural preference at a more doctrinal level, positing that the Rome Statute's substantive criminal law embeds an overly narrow view of environmental liability. Thus, even with a strong policy impetus, the ICC can exert only a modest jurisdiction over perpetrators of environmental degradation.

⁶ Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (CH Beck 2022) 10.

⁷ Rosemary Mwanza, ‘Enhancing Accountability for Environmental Damage under International Criminal Law: Ecocide as a Legal Fulfilment of Ecological Integrity’ (2018) 19 MJIL 586, 597.

⁸ Rome Statute (n 4) art. 5.

⁹ The International Law Commission proposed a crime of “wilful and severe damage to the environment” in its draft code of crimes against the peace and security of mankind, although this was excluded from the final document. See International Law Commission, *Yearbook of the International Law Commission 1991, vol II, pt. 2, Report of the Commission to the General Assembly on the Work of its 43rd Session* UN Doc A/CN.4/SER.A/1991/Add.1, 97.

¹⁰ Office of the Prosecutor, *Policy paper on case selection and prioritisation* (15 September 2016) 3-4; OTP, *Draft Policy on Environmental Crimes under the Rome Statute* (18 December 2024).

¹¹ Despite relevant communications from situations in Cambodia and Nigeria. See ICC-OTP, *Report on Preliminary Examination Activities 2020* (14 December 2020) 11; ICC-OTP, *Report on Preliminary Examination Activities 2018* (5 December 2018) 58.

¹² Rachel Hamilton, ‘Criminalizing Ecocide: An Opportunity to Embed the Inseparability of Humans from Nature into Law’ (2025) 38 Harvard Human Rights Journal 69; Randle DeFalco, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice* (1st edn, CUP 2022) 251.

C. ENVIRONMENTAL DAMAGE AS A WAR CRIME

Environmental destruction routinely accompanies armed conflict. This phenomenon is well-evidenced in the “Agent Orange” herbicide deployed by the US military across six million acres of land during the Vietnam War, the scorched earth tactics of Iraqi soldiers combusting oil wells and polluting adjacent water sources in Kuwait, and the destruction of the Kakhovka dam in Ukraine by Russian forces, resulting in catastrophic flooding and environmental devastation.¹³ Given this legacy, Additional Protocol I to the Geneva Conventions (AP I)¹⁴ and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)¹⁵ sought to regulate wartime environmental damage, introducing a proscription on such significant and excessive harm into international humanitarian law.¹⁶ Article 8(2)(b)(iv) of the Rome Statute embeds these norms, criminalising the intentional launching of an attack with knowledge that it would cause “widespread,” “long-term,” and “severe” damage to the natural environment, where such damage is “clearly excessive” to the concrete and direct military advantage anticipated. This represents the singular ecocentric clause in the Rome Statute that ascribes intrinsic significance and independent protection to the natural environment, such that an attack is sufficient to trigger liability, even in the absence of a direct humanitarian impact. As Cusato posits, this dissent from the anthropocentric consensus of harm otherwise maintained by the Rome Statute carries strong symbolic weight.¹⁷

(1) Material Scope

Although an ecocentric crime is expressively potent, its application is curtailed by strict conditions of liability. As a war crime, Article 8(2)(b)(iv) requires the coincidence of environmental damage with international armed conflict.¹⁸ This factual nexus is problematic for two key reasons. First, the conduct of non-international armed conflict has an equally, if not greater, adverse impact on the natural environment, due both to the higher frequency of internal conflicts and the often more localised and aggressive nature of

¹³ Bronwyn Leebaw, ‘Scorched Earth: Environmental War Crimes and International Justice’ (2014) 12 *Perspectives on Politics* 770; Shah Maruf, ‘Environmental Damage in Ukraine as Environmental War Crime Under the Rome State: The Kakhovka Dam Breach in Context’ (2024) 22 *JCIJ* 99, 103-105.

¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I).

¹⁵ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Technique (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151 (ENMOD).

¹⁶ AP I, art. 35(3); ENMOD, art. 1(1).

¹⁷ Eliana Cusato, ‘Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction before the ICC’ (2017) 15 *JCIJ* 491, 496.

¹⁸ Rome Statute (n 4) arts. 8 and 8(2)(b); Assembly of State Parties to the Rome Statute of the International Criminal Court, *Elements of Crimes* (in force 9 September 2002) ICC-ASP/1/3 108; Art. 8(2)(b)(iv) Element 5.

insurgency warfare.¹⁹ The extensive land-mining of biodiverse natural parks during the 1990-1994 Rwandan civil war, contamination of water sources by Colombian anti-government rebels sabotaging oil pipelines, and scorched earth tactics of Islamic State militants igniting oil wells outside Mosul and polluting surrounding land, all exemplify the destructive military practices that elude international criminal law scrutiny under Article 8(2)(b)(iv).²⁰ The restriction of its application to wartime scenarios neglects the greater global environmental decline caused by the industrial and unsustainable exploitation of natural resources during peacetime.²¹ Even the upstream conduct of such activities to finance military operations is unlikely to fall within Article 8(2)(b)(iv), since the provision envisages a kinetic “attack” directly associated with active hostilities.²² Criticism that this provision overlooks peacetime environmental damage is perhaps misplaced, given war crimes are conceived to regulate *jus in bello* rather than to provide comprehensive protection of environmental interests. Yet if the Rome Statute already condemns certain environmentally destructive practices during armed conflict, the absence of an equivalent peacetime provision speaks to both a substantive oversight and normative inconsistency in international criminal law that is difficult to justify on factual grounds.²³

(2) Damage and Proportionality

The specific objective and subjective elements of Article 8(2)(b)(iv) are equally restrictive. The *actus reus* refers to an impact threshold of “severe,” “widespread,” and “long-term” harm. In their ordinary meaning, “severe” relates to the intensity of the environmental damage caused, whereas “long-term” and “widespread” connote a specific temporal and geographical impact, respectively.²⁴ However, the Rome Statute and the Elements of Crimes are silent on the precise threshold at which the intensity and scale of an attack trigger liability; the ICC has yet to provide any substantial guidance on this point within its jurisprudence.²⁵ Without

¹⁹ Mark Drumbl, ‘Waging War Against the World: The Need to Move From War Crimes To Environmental Crimes’ in Jay Austin and Carl Bruch (eds), *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives* (CUP 2010) 631; Jessica Lawrence and Kevin Jon Heller, ‘The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime’ (2007) 20 *Georgetown International Environmental Law Review* 61, 85.

²⁰ Lawrence and Heller (n 19) 84-85; Thibaud de La Bourdonnaye, ‘Greener insurgencies? Engaging non-State armed groups for the protection of the natural environment during non-international armed conflicts’ (2020) 102 *International Review of the Red Cross* 574, 583-84.

²¹ Mwanza (n 7) 598-605; Mark Drumbl, ‘International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?’ (2001) 6(2) *ILSA Journal of International and Comparative Law* 305, 325.

²² Matthew Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (CUP 2022) 96-97.

²³ Frédéric Mégret, ‘The Case for a General International Crime against the Environment’ in Sébastien Jodoin and Marie-Claire Cordonier Segger (eds), *Sustainable Development, International Criminal Justice, and Treaty Implementation* (CUP, 2013) 56.

²⁴ For further detail, see Ananya Mukherjee, ‘Article 8(2)(b)(iv) of the Rome Statute: All Bark and No Bite?’ (2021) 3 *International Journal of Legal Science and Innovation* 997, 999-1001.

²⁵ According to: ICC, ‘Case Law Database’ (ICC Legal Tools Database) <<https://legal-tools.org/cld>> accessed 1 April 2025, input ‘Keyword Search’ and ‘Article 8(2)(b)(iv)’; seventeen results were provided, none defined the impact criteria.

statutory or judicial clarity, the ICC may resort to existing interpretations of identical terminology in the ENMOD and AP I.²⁶ On this view, liability would attach where environmental harm causes serious disruption to human life or natural and economic resources, encompassing an area of several hundred square kilometres and enduring for a period of either months or decades, depending on the definition consulted.²⁷

Should Article 8(2)(b)(iv) import the standard envisaged by the ENMOD and AP I, two key limitations would arise. First, these instruments adopt anthropocentric measurements of scale and intensity, which presuppose that environmental damage can be neatly quantified and assessed along such parameters;²⁸ this claim does not align with contemporary scientific knowledge, which recognises the more complex and non-linear dynamics governing ecological processes that do not observe such arbitrary boundaries.²⁹ Second, the criteria of “severe,” “widespread,” and “long-term“ apply conjunctively. Thus, assuming the definitions offered by the ENMOD and AP I are correct, liability for this crime can arise only in the most extreme cases. Save for the use of certain nuclear, chemical, or biological weaponry, conventional means and methods of warfare that are unable to attain the requisite gravity face no meaningful resistance from Article 8(2)(b)(iv).³⁰

As such, the proportionality element of Article 8(2)(b)(iv) merits attention. It demands the damage be “clearly excessive” to the “concrete and direct overall military advantage anticipated.” By inserting the qualifier “clearly” and adopting the less stringent “military advantage” test, as opposed to the more exacting doctrine of “military necessity” in international humanitarian law, Article 8(2)(b)(iv) applies a proportionality analysis that is deferential to military interests.³¹ This latitude is expanded by the vexing *mens rea* element which requires the specific perpetrator’s foreknowledge that the environmental damage would be clearly excessive.³² Given the conviction that commanders and political leaders attach to military objectives, it would be difficult for the ICC to refute any subjective value judgment that the environmental damage was disproportionate to the aim pursued.³³ Therefore, this test performs an exculpatory function,

²⁶ Rome Statute (n 4) art. 21(1)(b).

²⁷ UNGA, ‘Report of the Conference of the Committee on Disarmament’ (Volume 1, 1976) UN Doc A/31/27, understanding of ENMOD, art. 1; travaux préparatoires to AP I measure “long-term” in decades but omit a definition of “severe” or “widespread.”

²⁸ ENMOD and AP I measure “severe” by disruption to human life or economic resources, “long-term” by decades, seasons or months, and “widespread” by kilometres.

²⁹ Harriet Nash, ‘Defining Appropriate Spatial and Temporal Scales for Ecological Impact Analysis’ (2014) 16 *Environmental Practice* 281, 284; Jean Clobert and Michel Loreau, ‘Theory and experiments to decipher the role of time and space in ecological systems, from populations to ecosystems’ (Research Features, 15 July 2021) <<https://researchfeatures.com/theory-experiments-decipher-time-space-ecological-systems-populations-ecosystems/>> accessed 16 November 2024; Drumbl (n 19) 625.

³⁰ Karen Hulme, ‘Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies’ (1997) 2 *JACL* 45, 61.

³¹ Drumbl (n 21) 319-320.

³² *Elements of Crimes* (n 18) art. 8(2)(b)(iv) Element 3.

³³ Gillet (n 22) 109-110.

enabling even the most serious instances of severe, widespread, and long-term environmental harm to be authorised on speculative military grounds.

(3) Article 8(2)(b)(iv): An Impotent Mechanism

Article 8(2)(b)(iv) has merit by indirectly acknowledging the environment as an independent interest in international criminal law. Yet, given the way the contextual, objective, and subjective elements conspire to truncate its prohibitive force, this recognition is largely cosmetic. Indeed, while appealing to ecocentric aspirations on a symbolic level, Article 8(2)(b)(iv) offers little prospect of enforcing this interest against the perpetrators of environmental destruction.

D. ENVIRONMENTAL DAMAGE AS AN UNDERLYING ACT

Without a strong basis to ground environmental liability under Article 8(2)(b)(iv), attention turns to the capacity of other substantive crimes to perform this function, namely, genocide and crimes against humanity.³⁴ In contrast to war crimes, genocide and crimes against humanity dispense with the nexus of armed conflict,³⁵ expanding the factual circumstances in which international criminal law may be applied to environmental destruction. However, express protection for the environment is not directly bestowed in peacetime scenarios, requiring environmental liability to be inferred from humanitarian atrocity. In this respect, the rule on *nullum crimen sine lege* binds the ICC to a strict interpretation of existing definitions,³⁶ cautioning against an artificially expansive construction of Articles 6 and 7. Nevertheless, there remains scope to read a green dimension into underlying acts of genocide or crimes against humanity while remaining faithful to the principle of legality.

³⁴ Rome Statute (n 4) arts. 5-7.

³⁵ Neither the Rome Statute, arts. 6-7, nor the *Elements of Crimes* indicate a requirement of armed conflict.

³⁶ Rome Statute (n 4) art. 22.

(1) Genocide

Article 6 of the Rome Statute defines genocide as any underlying act committed with intent to entirely or partly destroy a certain ethnic, national, religious, or racial group. Thus, the operative core is the intention to erase a protected group, with environmental destruction potentially serving as a means of realising that aim. This thesis finds support in the *Prosecutor v Akayesu* decision, where the International Criminal Tribunal for Rwanda recognised the use of systematic rape as a tool to further genocidal objectives.³⁷ Although this tribunal jurisprudence does not assume automatic relevance for the ICC as a matter of doctrinal precedent,³⁸ the *Akayesu* case nonetheless sets out the logical basis for similarly conceptualising environmental harm as a means of perpetrating genocide.³⁹ Most relevant to this approach is Article 6(c) of the Rome Statute, which identifies the deliberate infliction of conditions of life calculated to bring about the physical destruction of a protected group, in whole or in part, as a possible genocidal act. The Elements of Crimes define such “conditions of life” as including resources indispensable for a group’s survival;⁴⁰ thus, it is plausible to conceive of a directed attack on a protected group’s natural means of subsistence as forming part of a broader genocidal policy. This nexus between environmental harm and genocide was acknowledged by the ICC in *Prosecutor v Al-Bashir*, where the Pre-Trial Chamber found the contamination of wells and water pumps in areas of Sudan specifically occupied by the Fur, Masalit, and Zaghawa ethnic groups contributed to the infliction of unsustainable conditions calculated to bring about their destruction.⁴¹ While the ICC has yet to apprehend Al-Bashir to substantively test this logic at trial, there is no reason to suspect it cannot be applied in other cases.⁴²

However, prospects for prosecuting genocide by environmental means are limited by the crime’s exacting *mens rea*. Article 6 requires that the perpetrator act with *dolus specialis*, a specific intention to destroy a protected group, in whole or in part. Scholars acknowledge the significant legal and evidentiary barriers to establishing *dolus specialis* in ordinary circumstances,⁴³ which are particularly acute in an environmental context. International law has steadily crystallised the concept of “sustainable development” as the normative paradigm for reconciling human wellbeing with sustainability objectives.⁴⁴ It is therefore

³⁷ *Prosecutor v Jean-Paul Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) paras 731-732.

³⁸ Rome Statute, art. 21(1)(b): “the Court shall apply [...] where appropriate, [...] the principles and rules of international law [...]”

³⁹ Tara Weinstein, ‘Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities’ (2005) 17 *Georgetown International Environmental Law Review* 697, 714.

⁴⁰ International Criminal Court, *Elements of Crimes* (2011), art. 6(c) element 4 (n 4).

⁴¹ *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Pre-Trial Chamber Decision) ICC-02/05-01/09 (12 July 2010) 7.

⁴² Cusato (n 17) 499.

⁴³ For example, see Kai Ambos, ‘What does ‘intent to destroy’ in genocide mean?’ (2009) 91 *International Review of the Red Cross* 833, 840.

⁴⁴ The Rio Declaration on Environment and Development (adopted by UN Conference on Environment and Development 3-14 June 1992) UN Doc A/CONF.151/26 (Vol 1) (Rio Declaration); see also, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) 1997 ICJ Rep 7 (25 September 1997), Separate Opinion of Vice-President Weeramantry, 95.

premised on the acceptance of some level of environmental destruction in pursuit of socioeconomic development.⁴⁵ The Rio Declaration on Environment and Development, for instance, expressly affirms the right of states to exploit resources pursuant to environmental and developmental policies within their jurisdiction.⁴⁶ As Sharp observes, this right to development provides a strong conceptual basis for state or corporate actors to excuse the fatal deterioration of vital environmental conditions affecting a local ethnic or indigenous population by reference to some communal benefit.⁴⁷

It is illustrative to examine the case of the Shiite Ma'Dan people who inhabited marshlands in Southern Iraq. Sustained attempts to destroy the indigenous group were precipitated when the Iraqi state constructed a system of dams and canals to drain these marshlands and destroy indispensable resources, resulting in the death and displacement of an estimated 200,000 to 400,000 individuals.⁴⁸ Yet, allegations of genocide were obfuscated by the contrary developmental objectives proffered by Iraqi officials.⁴⁹ Without strong evidence of *dolus specialis*, thinly disguised socioeconomic justifications remain an effective tool to thwart genocide prosecutions, even where facts align with the crime's objective element. Thus, persuading the ICC that a case of targeted environmental harm alone amounts to an act of genocide would be decidedly challenging, weakening the potential of Article 6 as an effective mechanism for environmental liability.

(2) Crimes Against Humanity

Article 7 offers a more expansive basis for environmental liability under the crimes against humanity rubric when knowingly committed as part of a widespread or systematic attack against the civilian population.⁵⁰ While articulating an exhaustive list falls outside the scope of this paper, the crimes of extermination, deportation, or forcible transfer of population, and persecution are the most relevant underlying acts for the present purposes.⁵¹ "Extermination" is understood to include the infliction of conditions of life calculated to cause the destruction of a part of the population,⁵² thereby encompassing the same conduct

⁴⁵ Raymond Cléménçon, 'Is sustainable development bad for global biodiversity conservation?' (2021) 4 *Global Sustainability* 1, 2.

⁴⁶ Rio Declaration (n 44) Principle 2.

⁴⁷ Peter Sharp, 'Prospects for Environmental Liability in the International Criminal Court' (1999) 18 *Virginia Environmental Law Journal* 217, 234.

⁴⁸ Aaron Schwabach, 'Ecocide and Genocide in Iraq: International Law, Marsh Arabs, and Environmental Damage in Non-International Conflicts' (2004) 27 *Colorado Environmental Law Journal* 1, 3-4.

⁴⁹ Weinstein (n 39) 718-19.

⁵⁰ Rome Statute (n 4) art. 7(1).

⁵¹ *ibid.* Arts. 7(1)(b), (d) and (h).

⁵² *ibid.* Art. 7(2)(b).

examined in respect of genocide, albeit within the framework of a “mass killing” of the civilian population as part of a widespread or systematic attack.⁵³

“Deportation or forcible transfer” refers to the forced displacement of persons from an area in which they were lawfully present, through expulsion or coercive acts.⁵⁴ This can incorporate environmental harm where displacement is induced by destabilising essential resources and ecosystems relied upon by local populations; examples of this are defoliating a forested region or discharging pollutants into a water source to compromise means of subsistence.⁵⁵ Such acts are frequently associated with “land-grabbing”, whereby communities are evicted from fertile land for exploitation and economic gain.⁵⁶ For instance, a communication under Article 15 of the Rome Statute invited the Prosecutor to initiate a *proprio motu* investigation into the mass expulsion of civilians from their lands following a land-grab and associated deforestation by the “Ruling Elite” in Cambodia.⁵⁷

Finally, “persecution” refers to the intentional and severe deprivation of fundamental rights, contrary to international law, against a protected group.⁵⁸ Although international law has yet to articulate a distinct and uniform right to a healthy environment, an emerging body of green human rights scholarship supports environmental integrity by situating it within established rights, including the rights to life, physical health, adequate nutrition, housing, privacy, and cultural life.⁵⁹

Prosecutors could draw on these insights to ground charges of persecution in instances of environmental manipulation carried out pursuant to a discriminatory animus. This is particularly pertinent in cases where Indigenous communities face habitat destruction or the destabilisation of shelter or subsistence, in breach of fundamental rights, as a result of occupying profitable land that obstructs developmental agendas.⁶⁰ However, it is important to note that persecution can only occur in connection with another international crime,⁶¹ limiting its utility as an independent mechanism for environmental liability.⁶²

⁵³ ICC, *Elements of Crime*, art. 7(1)(b) Elements 2-3.

⁵⁴ Rome Statute (n 4) art. 7(2)(d).

⁵⁵ Luigi Prospero and Jacopo Terrosi, ‘Embracing the ‘Human Factor’ (2017) 15 JICJ 509, 520.

⁵⁶ *ibid.*

⁵⁷ Global Diligence, ‘Communication Under Article 15 of the Rome Statute of the International Criminal Court: The Commission of Crimes Against Humanity in Cambodia – July 2002 to Present’ (7 October 2014) <https://www.fidh.org/IMG/pdf/executive_summary-2.pdf> accessed 30 March 2025; Gillet (n 22) 82.

⁵⁸ Rome Statute, art. 7(2)(g).

⁵⁹ Mark Gray, ‘The International Crime of Ecocide’ (1996) 26 California Western International Law Journal 215, 222-223; Lisa Oldring and Kate Mackintosh, ‘The Crime of Ecocide Through Human Rights: A New Tool for Climate Justice’ (International Crimes Database, Brief 27, 2022) 2.

⁶⁰ Alessandra Mistura, ‘Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework’ (2018) 43 Columbia Journal of Environmental Law 181, 209.

⁶¹ Rome Statute (n 4) art. 7(1)(h); ICC, *Elements of Crime*, art. 7(1)(h) Element 4.

⁶² Gillet (n 22) 86.

Establishing that environmental harm amounts to extermination, deportation or forcible transfer, or persecution is contingent upon satisfying the contextual and mental elements of crimes against humanity, namely the existence of a widespread or systematic attack directed against a civilian population.⁶³ The former carries a quantitative connotation, referring to the large-scale scope of the attack, while the latter denotes a qualitative standard relating to the organised nature of the conduct in question.⁶⁴ Either criterion may be satisfied under the disjunctive formulation of Article 7. Thus, prosecuting environmental harm as a crime against humanity benefits from dispensing with the *scienter mens rea* element that is fatal to a genocide conviction, although the underlying act must nevertheless be executed pursuant to a state or organisational policy directed against the civilian population.⁶⁵ Again, the risk of liability being confounded arises when the policy underpinning the perpetrator's conduct is rooted in developmental, commercial, or economic objectives rather than by a motivation to oppress a human collective.⁶⁶ Nevertheless, the mental element of crimes against humanity requires only the perpetrator's knowledge of the broader attack on the civilian population and of the contribution their conduct would make to that attack.⁶⁷ Thus, where the continuous and foreseeable consequence of environmentally deleterious activities is the destruction or displacement of the local population, an organisational policy sustaining such activities is akin to a policy to attack that population.⁶⁸ By allowing liability to flow from *dolus eventualis*, rather than the stringent *dolus specialis* requirement of genocide, the crimes against humanity framework provides a more viable basis for establishing environmental jurisdiction before the ICC.

(3) Environmental Liability Through an Anthropocentric Lens

The preceding sections have surveyed the possibility of prosecuting genocide or crimes against humanity perpetrated through environmental damage. However, relying on these provisions to impose international justice on perpetrators of environmental degradation remains an inherently constrained approach. Genocide and crimes against humanity predicate liability on a demonstrable human impact, thereby exhibiting a clear anthropocentric orientation. It follows that the ICC contemplates peacetime

⁶³ Rome Statute (n 4) art. 7(1).

⁶⁴ *Prosecutor v Germain Katanga* (Trial Chamber II) ICC-01/04-01/07-3436-T (7 March 2014) para 1098.

⁶⁵ Rome Statute (n 4) art. 7(2)(a).

⁶⁶ Jessica Durney, 'Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court' (2018) 24 *Hastings Environmental Law Journal* 413, 417.

⁶⁷ *Prosecutor v Bemba* (Pre-Trial Chamber II) ICC-01/05-01/08-424 (15 June 2009) para 88.

⁶⁸ ICC, *Elements of Crime*, art. 7 Element 3 fn 6; see also Sharp (n 47) 239.

environmental harm only insofar as it intersects with identifiable humanitarian consequences, rather than recognising the environment as an object of independent legal concern.⁶⁹

This framework may be more readily applied in straightforward cases, such as incidents of extermination, deportation or forcible transfer, persecution, or the infliction of conditions of life intended to cause the destruction of a protected group, where the proximity between the environmentally destructive act and its specific human impacts allows a clear causal link to be established.⁷⁰ These consequences cannot be traced to a single act of harm. Instead, they emerge gradually and indirectly, making it difficult to describe them as a targeted attack on a specific population under the definitions of genocide or crimes against humanity.⁷¹ In short, framing environmental liability through an anthropocentric lens overlooks the full extent of destructive practices and their complex causality with humanitarian outcomes, yielding only a modest space in which the ICC may exercise jurisdiction.

Beyond the foregoing practical constraints, this approach reflects a deeper normative prejudice. Although the prosecutor maintains a policy that the Rome Statute recognises and protects the “inherent value” of the natural environment,⁷² this claim withers under closer doctrinal scrutiny. Notwithstanding the ecocentric war crime, which affords little meaningful protection, the Rome Statute subordinates environmental harm to humanitarian interests,⁷³ assigning it only to incidental or instrumental significance. Therefore, invoking a green interpretation of crimes predisposed toward anthropocentrism fails to challenge the marginalisation of ecocentric concerns within international criminal law. This embeds the regressive normative position that environmental damage warrants redress only insofar as it violates core human interests.⁷⁴ This view also aligns with the expressive function of the ICC, which conveys the international community’s condemnation of atrocity crimes.⁷⁵ Adjudicating environmental destruction from an anthropocentric perspective signals condemnation of the humanitarian atrocity but dilutes equivalent opprobrium for the severity of harm inflicted upon the natural world itself.

⁶⁹ Payal Patel, ‘Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand the Court’s Mandate to Prosecuting Environmental War Crimes’ (2016) 14 *Loyola University Chicago International Law Review* 175, 182.

⁷⁰ Ammar Bustami and Marie-Christine Hecken, ‘Perspectives for a New International Crime Against the Environment: International Criminal Responsibility for Environmental Degradation under the Rome Statute’ (2021) 11 *GJIL* 145, 166.

⁷¹ *ibid.*; Mégret (n 23) 65-66.

⁷² Albeit conceding the Rome Statute is primarily anthropocentric. See OTP (n 10) 3.

⁷³ Gillet (n 22) 6-7.

⁷⁴ *ibid.*; Mwanza (n 7) 598-99.

⁷⁵ Florian Jeßberger and Julia Geneuss, ‘The Many Faces of the International Criminal Court’ (2012) 10 *JICJ* 1081, 1086-87.

E. CONCLUSION

In the context of accelerating global ecological decline, the effective protection of environmental interests under international law has become an urgent undertaking. The ICC is often promoted as a forum for strengthening accountability by prosecuting agents of environmental degradation. Although this impulse is informed by laudable aims, the prospects for imposing environmental justice under the current apparatus of international criminal law remain limited. The Rome Statute criminalises direct assaults on the natural environment under Article 8(2)(b)(iv) but restricts its application to international armed conflict. The same Statute subjects liability to stringent thresholds of damage and disproportionality, providing little, if any, protection. In peacetime, environmental harm may constitute an underlying act of genocide or crimes against humanity, but it is not recognised as a matter of independent legal concern. Aside from being a normatively reductive position, this incidental treatment provides little legal basis for prosecuting environmentally destructive practices that do not immediately target human populations but *will* manifest harmful effects over the long term.

By omitting an ecocentric provision in peacetime contexts, international criminal law fails to acknowledge that effective protection of humanitarian and environmental interests is inextricably entwined. This doctrinal shortcoming cannot be remedied by an ambitious prosecutorial policy. Rather, a meaningful “green shift” at the ICC requires the development of a mechanism for environmental liability independent of wartime or anthropocentric crime.